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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-345

Filed: 1 November 2016

New Hanover County, No. 12 CRS 056062

STATE OF NORTH CAROLINA

v.

MARKYES JONES

Appeal by defendant from judgment entered 22 January 2016 by Judge Charles H. Henry in New Hanover County Superior Court. Heard in the Court of Appeals 24 October 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Wes Saunders, for the State.*

*Hollers & Atkinson, by Russell J. Hollers, III, for defendant-appellant.*

TYSON, Judge.

Markyes Jones ("Defendant") appeals from a judgment entered after a jury's verdict convicted him as guilty of common law robbery and conspiracy to commit common law robbery. We hold the trial court did not err in denying Defendant's request to instruct the jury on the lesser-included offenses of misdemeanor larceny and conspiracy to commit misdemeanor larceny.

## I. Background

The State's evidence at trial tended to show that on 21 June 2012, around 9:30 p.m., Victoria Green and Patricia Wingfield were walking home from dinner in downtown Wilmington when they observed two men leaning against the USO building. Ms. Wingfield felt suspicious of the men, and suggested to Ms. Green that they cross to the other side of the street. The two men then asked the women if they knew what time it was; Ms. Wingfield replied that she did not know. The men again asked the women for the time and Ms. Wingfield said she did not know. The third time the men asked for the time, Ms. Wingfield told Ms. Green to run and she began to run down the street.

Ms. Green testified the men chased her and she was able to run only about ten feet before the men knocked her onto the ground and yanked her purse off her arm. Ms. Wingfield testified she heard footsteps behind her and shortly thereafter heard Ms. Green scream. When she turned around, she saw the two men on top of Ms. Green and she called 911.

New Hanover County Sheriff's Deputy Chris Cottle and Detective Dean Olinger responded to the call. When they arrived at the scene, a resident directed them to the location of possible suspects. As the officers approached some shrubbery, Defendant and Sean McMahan ("McMahan") ran out from behind the bushes and were apprehended by the officers after a short pursuit. Ms. Wingfield positively identified Defendant and McMahan as the men who chased her and Ms. Green and

took Ms. Green's purse. McMahan then led officers to the location of Ms. Green's stolen purse.

At the police station later that night, Defendant received and waived his *Miranda* rights and spoke with officers about the incident. He stated that he had a bad home life, did not have any money for food, and was not feeling well due to the medication he had taken earlier that day. He admitted he had stolen the purse from Ms. Green, but stated that he did not push her. Defendant told officers that Ms. Green fell because she was intoxicated and he took her purse after she fell. When he was asked what his intention toward Ms. Green was that night, Defendant stated, "[t]o chase after [the women] and take the purse."

Defendant was indicted on common law robbery, conspiracy to commit common law robbery, and resisting a public officer on 13 August 2012. At the trial held 20 January 2016, Defendant testified he went to McMahan's house on 21 June 2012. McMahan ordered pizza, but did not have money to pay for the pizza when it was delivered. Defendant testified he and McMahan went downtown "to the pizza shop to look for work." Defendant felt very ill and needed to eat. He had unsuccessfully asked a couple of people for money.

Defendant testified McMahan began to talk about getting money for food by stealing it, but Defendant was not feeling well from medication he had taken earlier that day and did not pay any attention to McMahan. When McMahan spotted Ms.

Green and Ms. Wingfield walking toward them, McMahaon said he was going to go up to the women. Defendant suggested he first ask the women for the time, and if they were friendly, then he should ask them for some money. Defendant testified that the women called them names, McMahan took offense to the name calling, and he ran after them. Defendant further testified that when he saw McMahan run after the women and take Ms. Green's purse, he ran away in the opposite direction, but McMahan followed him with the stolen purse.

At the close of all the evidence, the State dismissed the charge of resisting a public officer. Defendant requested the trial court to instruct the jury on the lesser-included offenses of misdemeanor larceny and conspiracy to commit misdemeanor larceny. The trial court denied his requests. The jury returned verdicts convicting Defendant as guilty of common law robbery and conspiracy to commit common law robbery. The trial court sentenced Defendant to 10 to 21 months imprisonment. Defendant gave oral notice of appeal.

## II. Issue

Defendant's sole argument asserts that the trial court committed reversible error by failing to instruct the jury on the lesser-included offenses of misdemeanor larceny and conspiracy to commit misdemeanor larceny.

## III. Standard of Review

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). "However, when the State's evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, the trial court is not required to submit and instruct the jury on any lesser included offense." *State v. Boykin*, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984). "When determining whether there is sufficient evidence for submission of a lesser included offense to the jury, we view the evidence in the light most favorable to the defendant." *State v. Ryder*, 196 N.C. App. 56, 64, 674 S.E.2d 805, 811 (2009). "We review the trial court's denial of the request for an instruction on the lesser included offense de novo." *State v. Laurean*, 220 N.C. App. 342, 345, 724 S.E.2d 657, 660, *appeal dismissed, and disc. review denied,* 366 N.C. 241, 731 S.E.2d 416 (2012).

## IV. Analysis

"Common law robbery is defined as the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Herring*, 322 N.C. 733, 739, 370 S.E.2d 363, 368 (1988) (internal quotation marks omitted). Misdemeanor larceny is a lesser-included offense of common law robbery. *State v. White*, 142 N.C. App. 201, 204, 542 S.E.2d 265, 267

(2001). "The only difference between the two crimes is that common law robbery has the additional requirement that the victim be put in fear by the perpetrator." *Id.*

Defendant contends the State's evidence was not positive as to the element of violence for the offenses of common law robbery and conspiracy to commit common law robbery. However, "[i]t is not necessary to prove both violence and putting in fear - proof of *either* is sufficient." *State v. Moore*, 279 N.C. 455, 458, 183 S.E.2d 546, 547 (1971) (emphasis in original). The State's evidence was sufficient to support the element of fear.

Both Ms. Green and Ms. Wingfield testified Defendant and McMahan chased after them when they attempted to run away. Once Defendant and McMahan began to chase Ms. Green, who was running away from them, the requisite fear to support common law robbery was established. Ms. Green testified that she was "very frightened" and "terrified." Ms. Green also testified the men tackled her, while Defendant stated that she fell because she was intoxicated. Even in the light most favorable to Defendant, Ms. Green only fell because Defendant and McMahan were running after her as she was attempting to escape from them. By placing Ms. Green in fear and chasing her, Defendant was able to deprive Ms. Green of her purse.

Defendant argues his statements to police show a crime of opportunity in that he stole Ms. Green's purse only after she fell down due to her being intoxicated. Defendant claims this conduct would only constitute misdemeanor larceny. However,

during his interview with police the night of the incident, Defendant admitted it was his intention that night "[t]o chase after [the women] and take the purse." The State's evidence tends to show Defendant formed the intent to steal the purse before Ms. Green ran and fell, which does not support Defendant's assertion of a crime of opportunity.

Defendant's trial testimony would also not support the instruction on misdemeanor larceny. In his testimony, Defendant denies any involvement in the taking of Ms. Green's purse and also denies he committed any crime. According to Defendant's testimony, he never ran after the women, he did not tackle Ms. Green, and he did not take her purse.

Defendant testified when he saw McMahan begin running after the women, he ran in the opposite direction away from the women. By Defendant's testimony, he did not take anything from Ms. Green and this testimony would not support the instruction of misdemeanor larceny or conspiracy to commit misdemeanor larceny but simply Defendant's guilt or innocence of the crimes as charged. Defendant's arguments are overruled.

## V. Conclusion

The State's evidence at a minimum shows Defendant and McMahan ran after the women in order to steal their purses, Ms. Green fell while running away from the

men in fear, and Defendant took her purse. This evidence is positive to all of the elements of common law robbery.

The trial court properly denied Defendant's request for an instruction on the lesser-included offenses of misdemeanor larceny and conspiracy to commit misdemeanor larceny. Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdicts or the judgment entered thereon.

NO ERROR.

Judges STROUD and INMAN concur.

Report per Rule 30(e).